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Issue date: 18Jan2001

Case No.: 2000-LHC-00398

OWCP No.: 02-117982

In the Matter of:

RALPH ESPOSITO

Claimant

v.

SEA-LAND SERVICE, INC.

Employer

Appearances:

Jorden N. Pedersen, Jr., Esq.
For Claimant

Keith L. Flicker, Esq.
For Employer

Before: **PAUL H. TEITLER**
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for disability compensation filed by Ralph Esposito, ("Claimant"), pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (the "Act").

A formal hearing was held in New York City, New York on April 6, 2000, at which time all parties were afforded full opportunity to present evidence and arguments as provided in the Act and applicable regulations. Claimant submitted exhibits 1 through 7 and Employer submitted exhibits A through Y.¹

The findings of fact and conclusions of law which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedents.

Stipulations

At the hearing, the following stipulations were entered into the record:

1. The date of the injury was January 10, 1996.
2. The Claimant suffered an injury to his right leg which resulted in orthopedic and psychiatric impairment.
3. The parties are subject to the Act.
4. An employer/employee relationship existed at the time of the injury.
5. The injury occurred in the course and scope of employment.
6. The Employer was provided timely notice of the injury.
7. The claim was filed in a timely manner.
8. Notice of Controversion was filed in a timely manner on September 13, 1999.
9. Disability resulted from the above injury.
10. Medical benefits were paid under §7 of the Act.

¹The following abbreviations are used in this opinion: CX refers to Claimant's exhibits; EX refers to Employer's exhibits; and TR refers to the transcript of the hearing on April 6, 2000.

11. The Claimant was provided temporary total disability compensation benefits from May 22, 1996 through September 6, 1999 at the compensation rate of \$782.44 based on an average weekly wage of \$2,337.20.

(TR at 6-7).

Statement of the Case

On January 10, 1996, Ralph Esposito ("Claimant") injured his right leg while working for Sea-Land Service, Inc. ("Employer"). Claimant received temporary total disability from Employer in the amount of \$782.44 per week from May 22, 1996 through September 6, 1999. He also received orthopedic and psychiatric treatment for his injury.

In October, 1997, Claimant initiated a third-party personal injury lawsuit in the Superior Court of New Jersey against Employer and fictitious defendants claiming the injuries he received on January 10, 1996 were the result of one of the fictitious defendants' negligence. Employer was named as a party to this third-party lawsuit for discovery purposes only. Snow Removal, Inc. ("Snow Removal") and AG Ship Maintenance ("AG Ship") were eventually named as defendants. Claimant was represented by Elliot Katz, Esquire, in the third-party lawsuit. Ken Simon, Esquire, of the law firm Flicker, Garelick & Associates served as Employer's compensation counsel in the Esposito case and as their counsel in the third-party suit regarding the identity of potential defendants. Cataldo Fazio, Esquire, also represented Employer in the third-party suit. Employer was ultimately dismissed from the third-party lawsuit.

This third-party action was settled against AG Ship for \$60,000 on August 24, 1999. Compensation and medical benefits were then terminated by Employer as of September 6, 1999. Employer alleges that it is no longer obligated to pay Claimant because Claimant failed to comply with §33(g) of the Act when he did not obtain Employer's written consent to a third-party settlement.

A formal hearing was held before the undersigned in New York City, New York on April 6, 2000. The Claimant, his wife, Linda Esposito, and the Claimant's attorney in the third-party action, Elliot Katz, Esquire, testified for Claimant at the hearing. Employer presented testimony from Cataldo Fazio, Esquire, who represented Employer as a defendant in the third-party action.

Issues

This case presents the following issues for resolution:

1. Whether or not Employer consented to a third-party settlement as required under §33 of the Act?

2. If Employer did not consent to a third-party settlement pursuant to §33 of the Act, whether Claimant remains entitled to medical benefits?
3. If Employer did not consent to a third-party settlement pursuant to §33 of the Act, whether Employer terminated compensation payments prematurely?

Finding of Fact and Conclusions of Law

Testimony of Ralph Esposito

Mr. Esposito, the claimant in this case, testified at the April 6, 2000 hearing. (TR at 148-155). Mr. Esposito was working as a hustler driver for Sea-Land Service when he was injured on January 10, 1996. (TR at 148). Following the accident, he was under medical treatment until August 1999 and receiving temporary disability benefits from Sea-Land. (TR at 149).

Mr. Esposito retained Mr. Katz to represent him in the third-party case. (TR at 149). He and his wife discussed his compensation benefits with Mr. Katz. (TR at 150). "My wife and I told him, please, don't ever have them bothered. And he said he would never have that happen. ... Because that was the only money we had to live on." (TR at 150). Mr. Esposito testified that he discussed settlement with Mr. Katz prior to the trial date. (TR at 150). However, Mr. Esposito did not wish to settle at that time. (TR at 151).

Mr. Esposito testified that when he arrived at the courthouse for the first day of the trial on August 24, 1999, Mr. Fazio was there. (TR at 152). Mr. Esposito saw Mr. Katz talking to Mr. Fazio at the courthouse on August 24th. (TR at 152). In addition, he testified that Mr. Fazio was present at the trial for two or three days and that Mr. Fazio sat right behind him. (TR at 153). In addition, when Mr. Esposito arrived at the courthouse on the first day of trial, August 24th, Mr. Katz presented him with papers regarding settling the case with AG Ship. (TR at 152).

Mr. Esposito testified that Mr. Katz told him "that the judge had said that they were going to throw AG Ship out of the case and that I should sign the papers, and I did what he told me to do." (TR at 152). When Mr. Esposito signed the release, it was his understanding that his compensation would not be affected at all. (TR at 153). He stated: "I had talked to him about that and he said he spoke to Sea-Land and their lawyers and everything was fine. And I said, you know, because right now we don't have any - you know, that is the only income. I can't work so - I worked hard all my life though." (TR at 153). Mr. Katz told Mr. Esposito he had spoken to Sea-Land's lawyers two or three times. (TR at 155-156). Mr. Esposito stated he and Mr. Katz talked about Sea-Land's approval on three or four different days. (TR at 156). Mr. Esposito never personally asked Sea-Land for their consent. (TR at 156-157).

Testimony of Linda Esposito

Mrs. Esposito testified at the April 6, 2000 hearing as a witness for the Claimant. (TR at 161-170). Mrs. Esposito is Claimant's wife. (TR at 161). The first time she and her husband discussed settling the third-party case with Mr. Katz was in July 1999, about one month before the trial. (TR at 163). The first offer was for around \$20,000 and Mrs. Esposito found that amount unacceptable. (TR at 164). The next time they discussed settlement was a week or two before the trial. (TR at 164). The second offer was for \$40,000 or \$50,000 and she and her husband felt this amount was also unacceptable. (TR at 164). The next time Mr. Katz discussed a settlement with her and her husband was on the first day of the trial. (TR at 165).

On the morning of the hearing, Mrs. Esposito went into the ladies room and when she came out, there was a man from AG Ship with her husband and her husband was holding a piece of paper. (TR at 167). Mr. Katz Explained to her at that point that it was a release, releasing AG Ship from the case because the judge was going to dismiss them anyway. (TR at 167). By that time her husband had already signed the release. (TR at 167). Mrs. Esposito asked Mr. Katz if everything would be "okay" and he assured her it would be.

And he said to me, yes. I spoke to whoever I had to speak to, everything is going to be fine - because I said to him, like I did many other times, my husband's income is all we have to live on right now, regardless, if this whole thing goes out the window, everything will be okay? He said, yes. I spoke to whoever I had to speak to, everything is going to be okay. (TR at 168).

In addition, Mrs. Esposito testified that she saw Mr. Fazio at the courthouse when she arrived there at 9:00a.m. on August 24, 1999, the first day of the trial. (TR at 167). She saw Mr. Katz speaking with a number of attorneys, including Mr. Fazio. (TR at 167). Mrs. Esposito did not know at the time that he was Mr. Fazio, however, she identified him at the April 6, 2000 hearing as the man she saw. (TR at 167). She stated she knew it was Mr. Fazio because he sat behind her everyday at the trial, including the last day of the trial. (TR at 169). She also remembers him being present on the last day of the trial because she remembers watching him walk to his car as she was looking out the window crying. (TR at 169). She was looking out the window because she didn't want anyone to see her crying. (TR at 169). Mrs. Esposito was not sure how many days the trial lasted or whether Mr. Fazio was present while the jury was out. (TR at 171).

Testimony of Elliot Katz, Esquire

Mr. Katz testified at the April 6, 2000 hearing as a witness for Claimant. (TR at 20-81, 134-141). Mr. Katz was retained by Claimant to represent him in his personal injury case. (TR at 22). Mr. Katz has practiced law for 25 years. He graduated from New York Law School in 1966 and was admitted to the New York Bar in 1967 and the New Jersey Bar in 1973. (TR at

21). He is the past president of the Association of Trial Lawyers in the City of New York and currently a member of the Board of Directors as well as the Director of the Continuing Legal Education Program for the Association of Trial Lawyers in the City of New York. (TR at 21). He has spent his career specializing in personal injury law. (TR at 21-22).

Prior to representing Claimant, Mr. Katz never had a case where New Jersey workers' compensation law or the issue of a lien under New Jersey workers' compensation law was involved. (TR at 45). He is familiar with these issues in New York however. (TR at 46). In addition, prior to Mr. Esposito's case, he never had a case involving the Federal Longshore and Harbor Workers' Compensation Act. (TR at 47).

Regarding his contact with Flicker, Garelick & Associates, the law firm representing Employer, Mr. Katz stated: "I believe I contacted them after I was advised I should direct my inquiries through that firm in New York [for discovery material]." (TR at 23). Mr. Katz does not know if he ever distinguished that Mr. Fazio represented Sea-Land in the third-party matter and that Flicker, Garelick & Associates was Sea-Land's compensation counsel. (TR at 48). In addition, Mr. Katz was under the impression that AG Ship would be dismissed from the case because AG Ship's motion to dismiss was denied primarily because the judge believed AG Ship had waited unreasonably long to file it.

Mr. Katz testified that he had contact with Mr. Fazio when he appeared on behalf of Sea-Land in the third-party action and when he sent Mr. Katz documents he had requested. (TR 23-24). Mr. Katz further testified that when Sea-Land was dismissed from the case, he entered into a Stipulation of Dismissal Without Prejudice with Mr. Fazio on March 26, 1998. (TR at 25-26), (CX 7). However, discovery and contact with Sea-Land went on after Sea-Land was dismissed. (TR at 26). For example, following the dismissal of Sea-Land, Mr. Fazio also represented Sea-Land at depositions, exchanged documents, and accompanied Mr. Katz on a tour of the Sea-Land facility. (TR at 25-26). In addition, Mr. Katz testified that Mr. Fazio "wanted to be notified and be kept apprised of what went on, and that was done by all the parties." (TR at 27).

Mr. Katz testified that prior to the start of the trial, AG Ship contacted him about the possibility of settling the case against them. (TR at 31). Mr. Katz discussed settlement with Claimant. (TR at 31). In addition, Mr. Simon sent him information he requested regarding the amount of Sea-Land's lien and Mr. Simon told Mr. Katz to "just keep us advised." (TR at 31-32), (EX I). Mr. Katz stated that he advised Mr. Simon of a the possibility of settlement because he had to know what Sea-Land's position was on its lien. (TR at 33). According to Mr. Katz, Mr. Simon said to keep him advised. (TR at 34). Once there was an offer of \$50,000, Mr. Katz informed Mr. Simon and told him that he did not believe the Espositos would take it. Once again Mr. Simon only said to keep him advised. (TR at 34). Based on these conversations with Mr. Simon, Mr. Katz believed that Mr. Simon was aware that there was a settlement offer on the table. (TR at 35).

Mr. Katz also testified that although Sea-Land was already out of the case at this point, he spoke with Mr. Fazio intermittently before the trial and that they had constant conversations the week before the trial because Mr. Katz subpoenaed the witnesses Mr. Fazio had represented in the depositions. (TR at 37). In addition, Mr. Katz testified that Mr. Fazio repeatedly asked if the case could be settled. (TR at 37). Mr. Katz stated that he informed Mr. Fazio that he did not know if there was a possibility of settling with Snow Removal and of AG Ship's settlement offer, but that Claimant and AG Ship were still apart on the numbers. (TR at 37-38). Mr. Katz testified that he had conversations with Mr. Fazio about the extent of AG Ship's liability. (TR at 39).

Mr. Katz testified that Mr. Fazio was at the courthouse the morning of the trial on August 24, 2000, that he informed Mr. Fazio of the \$60,000 settlement offer from AG Ship, and told him that the Espositos had not yet accepted it. (TR at 40). Mr. Katz testified that in response to being told that AG Ship offered \$60,000, in reference to the fact that AG Ship's liability was doubtful, Mr. Fazio said words to the effect of "you stole some money." (TR at 41).

The case against AG Ship did in fact settle for \$60,000 on August 24, 2000. (TR at 40). Mr. Katz testified that Mr. Fazio refused to sign a copy of the release prepared by AG Ship's attorney, stating "I don't know if I should sign this." (TR at 41). Mr. Simon was not at the courthouse the morning of the hearing and settlement on August 24, 1999. (TR at 40). Mr. Katz never believed that Claimant's right to compensation was jeopardized by his settling the case and based on his discussions with the attorneys in the case, he believed that Claimant's compensation would continue. (TR at 41).

In addition, Mr. Katz did not know that he needed Sea-Land's consent, either written or oral. (TR at 64-65). However, Mr. Katz also believes he had Sea-Land's consent to the settlement based on Mr. Fazio's reaction to it. (TR at 65). He stated that when Mr. Fazio, learned of the \$60,000 settlement offer, he said words to the effect of "that's a steal." (TR at 67). In addition, he testified that when he entered into the settlement with Claimant, the issue of consent was not on his mind. (TR at 66).

Regarding whether Mr. Katz obtained Mr. Fazio's consent to the settlement, Mr. Katz testified as follows:

Q: You didn't ask Mr. Fazio for Sea-Land's consent to enter into that settlement with Mr. Esposito, did you?

A: Did I specifically say to him, is it all right with you? No, because it was clear that he thought that was great and he never objected.

Q: Whether he thought it was great or not, that means to you that you were authorized to do it?

A: Authorized by whom?

Q: Authorized by Sea-Land to do it?

A: I would assume that if Mr. Fazio felt I shouldn't enter into that settlement, or that I should go some other way, Mr. Fazio would say, wait a minute, time out. You don't have my permission to settle that, you had better call Mr. Simon. I don't want to have anything to do with this. That was the exact opposite of what he was doing there. He thought it was the greatest thing since Swiss cheese that I got this money, and he did not say anything to me about, stop, do something else. He just said, that is unbelievable, you got money from a defendant who doesn't owe any money. And the words he used were - this I remember - you just stole some money. (TR at 63-64).

Mr. Katz also testified that he did not tell Mr. Simon of the \$60,000 settlement offer because Mr. Simon "knew what was going on, and he never expressed that I shouldn't do it, that I should call him first, that I should get a letter. I mean, he knew what was going on, he was apprised." (TR at 68). In addition, he testified that when he was negotiating with AG Ship, he believed that Sea-Land was going to compromise its lien because when he informed Mr. Simon of the \$50,000 settlement offer, Mr. Simon never said anything to the effect of "you had better get enough money to satisfy our lien in full, we are not going to compromise our lien, we are not going to reduce our lien." (TR at 71). However, Mr. Katz admitted that Mr. Simon never actually said that Sea-Land would compromise their lien. (TR at 72).

Mr. Simon claims he was not aware of a settlement and that he never approved such a settlement. Mr. Simon sent a letter to Mr. Katz dated August 23, 1999. (EX J). This letter explicitly advised Mr. Katz of the §33(g) issue. (TR at 72). This letter was faxed to Mr. Katz's New York office at about 1:00 in the afternoon on Monday, August 23, 1999. (TR at 35). Mr. Katz stopped at his office where the fax had been sent to pick up materials he needed for the trial the next day, but left for New Jersey without having seen Mr. Simon's fax. (TR at 37). The employee in charge of delivering faxes was out that day so the fax was never put on Mr. Katz's desk or in his file. (TR at 73). Accordingly, Mr. Katz testified that "[t]he first time I saw [the letter] was about - when the trial was over, four, five - six days after the trial commenced." (TR at 36).

Mr. Katz never looked at any aspect of the Act until after the trial and the settlement. (TR at 49). However, Mr. Katz testified that because he was in contact with Mr. Simon prior to the trial regarding Sea-Land's lien and "in view of the fact the Mr. Simon never once said to me, you know, you had better get it in writing, that is our position, and just kept saying to me, just keep us advised, let us know, I didn't feel it was necessary to look at any statute when I am dealing with a member of the Bar." (TR at 50). He further stated:

I think it was Mr. Simon's responsibility [to educate him as to the Longshore Act], since he knew that I was discussing this with him and I was interested in knowing what his rights were, what we

should do to protect it, that he should advise me properly as to what he wants done. If he wanted it all to be done in a letter, in a consent and obtained in a letter, all he had to say to me was, keep us advised, let us know, but remember, we have to give written consent - not to wait six hours or twelve hours before the trial starts. (TR at 51-52).

Mr. Katz admits that Mr. Simon never specifically stated that he consented to a \$60,000 settlement from AG Ship and that he did not inform Mr. Simon of the settlement until after it had been completed. (TR at 77-78). Mr. Katz testified that Mr. Simon consented to the settlement because he knew that Mr. Katz was inquiring about Sea-Land's lien, he knew that Mr. Katz was trying to get a settlement package, and he knew of the \$50,000 settlement offer. (TR at 74). In addition, Mr. Katz testified: "He never once said, get it in writing; (2) We don't release liens; (3) Whatever Mr. Esposito gets we are going to make a claim for it." (TR at 74).

Mr. Katz received Claimant's settlement check from AG Ship. (TR at 45). To date that check has not been cashed. (TR at 45).

Testimony of Cataldo Fazio, Esquire

Cataldo Fazio testified at the April 6, 2000 hearing as a witness for Employer. (TR at 84-133). Mr. Fazio is a practicing attorney admitted in New York and New Jersey, as well as a part-time municipal court judge in the City of Hoboken, New Jersey. (TR at 84). He graduated from the New York Law School in 1985. (TR at 84). Mr. Fazio's practice handles general liability, personal injury, and product insurance coverage disputed. (TR at 85). Mr. Fazio's firm handles Sea-Land's land based claims. (TR at 85). These are general liability claims that do not fall under the Longshore and Harbor Workers' Compensation Act. (TR at 85). In addition, Mr. Fazio testified that he has never represented Sea-Land in a case in connection with the Longshore Act and that he is "not really" familiar with the Act. (TR at 86). Therefore, in August, 1999 Mr. Fazio was not familiar with the provisions of §33(g) and did not know that the consent of the employer lienholder was required of a third-party plaintiff. (TR at 86).

Mr. Fazio testified that he had no interest, as Sea-Land's counsel, on the liability aspect of the third-party case. (TR at 99-100). He attended the depositions of three Sea-Land employees and was also present during the deposition of a non-Sea-Land employee because that deposition was sandwiched between the Sea-Land employees' depositions. (TR at 94-95). Mr. Fazio was also present at an inspection of the terminal premises that was requested by one of the defendants in the third-party action. (TR at 95). He did not intend to have a role in the actual trial, but did intend to be present to represent Sea-Land's employees who were being called as witnesses. (TR at 98).

Mr. Fazio testified that when he spoke to Mr. Katz prior to the trial regarding the Sea-Land witnesses there was no mention of settlement negotiations. (Tr at 99). Mr. Fazio further testified that he did not learn about any settlement negotiations or that a settlement had been reached until August 26th, the date the Sea-Land employees were scheduled to testify and after Mr. Esposito entered into the settlement agreement, and that Mr. Katz never asked for his consent to the settlement. (TR at 95, 112). In addition, Mr. Fazio stated that he was not in the courtroom or the courthouse on August 24th, the day the settlement was entered into. (TR at 113). His recollection of his whereabouts the week of August 23rd was based on a review of his time records as well as the fact that he had a vacation scheduled for the week of August 24th, August 25th was his father's birthday, and one of his friends passed away on August 26th, 2000, the day he was in court because the Sea-Land employees testified. (TR at 114). Mr. Fazio had returned from his vacation early in order to be present when the Sea-Land employees testified. (TR at 115).

Applicable Law

The Longshore and Harborworkers' Workers' Compensation Act is a humanitarian act and "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Bethlehem Steel Corporation v. Mobley*, 920 F.2d 558, 561 (9th Cir. 1990) (quoting *Voris v. Eikel*, 346 U.S. 328, 333 (1953)). "Under section 33(g)(1)², a claimant is required to obtain the approval of the employer when the claimant settles an action against a third-party, if the settlement is for an amount less than the amount of 'compensation' for which the employer is liable." *Mobley*, 920 F.2d at 559. Under section 33(g)(2)³, a claimant forfeits "compensation" and "medical benefits" if he does not comply with

²Section 33(g)(1) provides in pertinent part:

(g)(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) for an amount less than the compensation to which the person (or the person's representative) would be entitled under this Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

³Section 33(g)(2) provides in pertinent part:

§33(g)(1) or if he does not notify the employer of a third-party settlement in either of the two situations where written consent is not required. “[A]n employee is required to provide notification to his employer, but is not required to obtain written approval, in two instances: (1) Where the employee obtains a judgment, rather than a settlement, against a party; and (2) Where the employee settles for an amount greater than or equal to the employer’s total liability.” *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 482 (1992).

The purpose of section 33(g) is to ensure that an employer’s rights are protected in a third-party settlement and to prevent a claimant from unilaterally bargaining away funds that an employer or its carrier might be entitled to under 33 U.S.C. §§933(b)-(f). For example, §33(f) provides that any money a claimant recovers from a third-party offset the amount owed by the employer. Therefore, written approval of the third-party settlement is not required when that settlement is for an amount greater than the amount of compensation the employee is entitled to from the employer because in such a situation, the employer’s liability would be completely offset by the settlement. *Mobley*, 920 F.2d at 559. “The written approval requirement of §33(g) ‘protects the employer against his employee’s accepting too little for his cause of action against a third-party.’” *Cowart*, 505 U.S. at 482 (quoting *Banks v. Chicago Grain Trimmers Assn., Inc.*, 390 U.S. 459, 467 (1968)). “Notification provides full protection to the employer . . . because it ensures against fraudulent double recovery by the employee.” *Cowart*, 505 U.S. at 483.

Although the Second Circuit has not yet spoken on the issue, exceptions to the written consent requirement of §33(g) do exist in some jurisdictions. For example, the Fourth Circuit Court of Appeals has held that written consent is not required where the employer was a co-plaintiff in the third-party suit with the claimant, participated in settlement negotiations, and recovered from the defendant, but then refused to give the claimant written approval of its settlement with the third-party defendant. *I.T.O. Corp. of Baltimore v. Sellman*, 954 F.2d 239, 242 (4th Cir. 1992), *vacated in part on other grounds*, 967 F.2d 971 (4th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). The court in *Sellman* concluded that because the statute does not refer to written approval or notice requirements where the employer participates in the settlements, written approval is not necessary when such employer participation is present. *Sellman*, 954 F.2d at 243. The Fourth Circuit’s holding in *Sellman* was followed by the Benefits Review Board (the “Board”) in *Denville v. Oilfield Industries*, 26 BRBS 123 (1992).

(g)(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this Act shall be terminated, regardless of whether the employer or the employer’s insurer has made payments or acknowledged entitlement to benefits under this Act.

In *Deville*, the Board explained that an employer adequately protects its interests of offset under §33(f) when it is an actual party to the settlement. *Id.*

Unlike the Fourth Circuit, the Fifth Circuit has found that there are no exceptions to the written consent requirement of §33(g) because the statute does not contain any. *Niklos Drilling Co. v. Cowart*, 907 F.2d 1552 (5th Cir. 1990). On rehearing *en banc*, the Fifth Circuit affirmed its earlier holding, finding that the plain language of the statute is unambiguous. *Nicklos Drilling Co. v. Cowart*, 927 F.2d 828, 832 (5th Cir. 1991). The Supreme Court in its review of the Fifth Circuit's *en banc* decision in *Cowart* refused to address the issue of whether there are any exceptions to the §33(g) written consent requirement because the parties had not specifically raised it in their petition for certiorari. *Cowart*, 505 U.S. at 483.

The Board has found that an employer's constructive approval of a third-party settlement satisfies the requirements of §33(g)(1). *Pinnell v. Patterson Service*, 22 BRBS 61,65 (1989), *affirmed in part*, 20 F.3d 465 (5th Cir. 1991) (unpublished opinion). In *Pinnell*, the Board found that the claimant was not bound by the forfeiture provision of §33(g) where the employer had intervened in the third-party action, agreed to waive part of its lien, paid compensation and medical benefits to the claimant until the day the settlement was entered into, and corresponded with the carrier's attorney confirming that employer would waive part of its lien. *Id.*

However, the Board has also found that mere intervention in the third-party case by the employer is not equivalent to implied consent to the settlement. *Pool v. General American Oil Co.*, 30 BRBS 183, 188 (1996). In *Pool*, the employer did not join in the settlement or agree to it. *Id.* Thus, the Board found that the employer's participation was "insufficient to preclude application of Section 33(g)(1) because although the "employer, through its carrier, intervened in the third-party case and participated, to some degree, in the settlement process," the employer did not "appear on the side of the claimant, did not sign the actual settlement and in fact specifically declined to do so." *Id.*

In addition, when approval of the settlement by the employer is a condition of the settlement, the employer's lack of consent to the settlement does not release employer from its obligation to pay because effectively, the settlement was never fully executed. *Smith v. Jones Oregon Stevedoring Co.*, 33 B.R.B.S. 155 (1999). Moreover, in *Perez v. International Terminal Operating Co.*, 31 B.R.B.S. 114 (1997), the Board found that an employer who waives part of its lien is not precluded from the application of §33(g) because waiving a lien was not to be construed as approval of a settlement.

The question of whether medical benefits are also forfeited if §33(g) is not complied with arises because §33(g)(1) of the Act refers only to "compensation" and does not specifically mention "medical benefits," while §33(g)(2) uses the terms "compensation" and "medical benefits." Section 2(12) of the Act defines "compensation" as "the money allowance

payable to an employee or to his dependents as provided for in this LHWCA, and includes funeral benefits provided therein.” 33 U.S.C. §902(12). “Medical benefits” are not included in §2(12)’s definition of “compensation.” In addition, “medical benefits” in §907 refer to actual medical expenses. *Mobley*, 920 F.2d at 560-61; 33 U.S.C. §907.

Although the Supreme Court has stated that §33(g) “provides that under certain circumstances if a third-party claim is settled without the written approval of the worker’s employer, all future benefits including medical benefits are forfeited,” the Court has not yet directly addressed the role that medical benefits play in §33(g) cases. See *Cowart*, 505 U.S. at 470. The Supreme Court did address the issue of medical benefits under the Act as they pertain to §13(a)⁴ cases in *Marshall v. Pletz*, 317 U.S. 383 (1943). In *Marshall*, the Court found that medical benefits are not included as compensation payments. *Marshall*, 317 U.S. at 388. The Court based its decision in part on §2(12)’s definition of compensation. *Id.* In addition, the Court noted several other provisions of the Act where medical care and compensation are referred to specifically. *Id.* at 390-91; See 33 U.S.C. §§§§§ 906(a), 907, 908, 910, 914. The Court further explained that medical benefits are not to be considered compensation under the Act because “[i]n the normal case, however, the insurer defrays the expense of medical care but does not pay the injured employee anything on account of such care.” *Id.* at 391.

The Ninth Circuit has determined that in certain circumstances, an employee’s failure to obtain his employer’s written consent before entering into a third-party settlement does not preclude him from receiving medical benefits from the employer. *Mobley*, 920 F.2d 558 (9th Cir. 1990). In *Mobley*, the claimant entered into a third-party settlement without the employer’s approval prior to the hearing to determine whether the claimant was disabled under the Act. *Id.* at 560. The Administrative Law Judge (“ALJ”) subsequently determined that the claimant was not disabled and thus was not entitled to disability benefits from the employer. *Id.* The ALJ, however, did order the employer to pay medical benefits to the claimant. *Id.* The employer subsequently argued that it was not liable to pay medical benefits because the claimant had entered into the settlement without the employer’s consent. *Id.*

Mobley held that §33(g)(1) was inapplicable because given that the employer was not liable for any disability benefits, the amount of the claimant’s settlement was necessarily greater than the compensation claimant was entitled to. *Id.* In addition, the court found that the employer was also liable for medical benefits because the notice it received of the settlement was timely under §33(g)(2). *Id.* at 561. Notice under §33(g)(2) is deemed timely if it is received by the employer “before it has to make payment and before the Agency orders it to make any payments.” *Id.* at 561. In *Mobley*, the notice was timely because the employer

⁴Section 13(a) of the Act pertains to the statute of limitations for filing claims under the Act.

learned of the settlement after it was entered into, but before the ALJ awarded medical benefits to the claimant.

In addition, *Mobley*, citing *Marshall, supra*, found that the ALJ's award of medical benefits was not material because medical benefits and compensation are distinct terms under the Act. *Mobley*, 920 F.2d at 560. The court explained this distinction as follows:

Indeed, this distinction is apparent in the wording of section 33(g) itself. Section 33(g)(1) refers solely to "compensation." In contrast, section 33(g)(2), which requires notification of any settlement regardless of amount, expressly conditions both "compensation" and "medical benefits" upon such notification. The absence of any reference to "medical benefits" in section 33(g)(1), when the phrase is included in a companion section, indicates that Congress did not intend to compel compliance with 33(g)(1) by one who is entitled only to medical benefits. *Mobley*, 920 F.2d at 561.

The Fourth Circuit has also found that medical benefits are not to be included as "compensation" under the Act. See *Brown & Root, Incorporated v. Sain*, 162 F.3d 813, 818-19 (4th Cir. 1998). In *Brown & Root*, the employer argued that the total amount of claimant's disability and medical benefits should be included in the §33(g) calculation. *Id.* at 818. The Fourth Circuit declined to do so because elsewhere in the Act, disability compensation and medical expenses are treated as distinct concepts. *Id.* at 818-819 (citing 33 U.S.C. §§907 (medical expenses), 908 (disability compensation)). The court explained that it agreed with the Ninth Circuit, the only other circuit to have previously considered the issue, and stated "the canon of construction that inclusion of particular language in one section of a statute suggests that the omission of such language in another section was intentional." *Brown & Rod*, 162 F.3d at 818 (citing *Mobley*, 920 F.2d at 560-561). The court also disagreed with employer's argument that the Supreme Court in *Cowart, supra*, intended for medical and disability benefits to be considered in the aggregate for purposes of §33(g) calculations. *Brown & Rod*, 162 F.3d at 819. In *Cowart*, the Court stated that an employer is not required to give consent whenever "the employee settles for an amount greater than or equal to the employer's total liability." *Brown & Rod*, 162 F.3d at 819. Employer argued that "total disability" should be read to include both medical and disability benefits. *Id.* The Fourth Circuit disagreed, however, and relied on the statutory language and the fact that other parts of the *Cowart* opinion referred to "total disability liability" and specifically excluded liability for future medical benefits. *Id.* (citing *Cowart*, 505 U.S. at 474).

1. Whether or not Employer consented to a third-party settlement as required under §33(g) of the Act?

Claimant first argues that although Employer never consented to Claimant's third-party settlement, Claimant is not barred from receiving benefits under §33(g) of the Act because Mr. Simon and Mr. Fazio knew about the third-party settlement offer and failed to notify Mr. Katz of its position regarding §33(g). Claimant asserts that Employer was aware of the settlement because Mr. Katz spoke to Mr. Fazio and Mr. Simon regarding the possibility of settlement and because Mr. Fazio was present at the courthouse on August 24, 1999 when the settlement agreement was signed. In addition, he believes that Employer was aware of the settlement because Mr. Fazio represented Sea-Land in discovery proceedings for the third-party case and commented that AG Ship's offer of \$60,000 was "a steal" or words to that affect. Mr. Katz testified that Mr. Simon was aware that there was the potential for settlement in the third-party case and told Mr. Katz to keep him advised of what was going on. Thus, Claimant contends that Employer had constructive notice of the settlement and this constructive notice provided the necessary approval of the settlement.

Claimant argues that *Sellman* bars forfeiture of Claimant's benefits pursuant to §33(g) because Mr. Fazio and Mr. Simon knew about the settlement and did not object to it. See, *I.T.O. Corp. of Baltimore v. Sellman*, 954 F.2d 239 (4th Cir. 1992). The facts of *Sellman*, however, differ significantly from the facts of the instant case. In *Sellman*, the Employer's participation was much greater than the role Employer's counsel played in Claimant's third-party settlement. The employer in *Sellman* was a co-plaintiff in the claimant's third-party suit, participated in the settlement negotiations, and recovered from the third-party defendant. Sea-Land on the other hand was actually named a defendant in Claimant's third-party case. In addition, although Mr. Fazio and Mr. Simon may have been aware of the potential for settlement, neither of them consented to the settlement in writing as required by §33(g). In fact, Mr. Katz testified that Mr. Fazio specifically refused to sign the settlement agreement at the courthouse on August 24, 1999⁵ and Mr. Simon sent a letter to Mr. Katz on August 23, 1999, one day before the settlement was entered into, advising Mr. Katz that pursuant to §33(g), a settlement could not be entered into without Sea-Land's written approval.

Mr. Katz also testified that Mr. Simon knew of the potential for settlement because he repeatedly asked Mr. Katz to keep his firm advised about the status of the third-party case. In weighing the evidence, I am persuaded by the fact that Mr. Katz claims Mr. Simon asked him to keep him advised, yet Mr. Katz failed to inform him that a settlement had been reached. In addition, I do not find that Mr. Simon or the Employer knew about the settlement and consented to it because although the amount of money Claimant received in the settlement was not as much as he was entitled to as disability compensation, Mr. Katz never sought a waiver of Employer's lien prior to settlement. Moreover, there is no evidence that the carrier consented to the settlement as required by §33(g). Therefore, I find that Sea-Land's

⁵It is noted that Mr. Fazio claims he was not in the courthouse that day. Regardless of whether he was not there, or if he was there but refused to sign the release, neither event amounts to consent to the settlement.

limited participation in and knowledge of the settlement in Claimant's third-party case does not rise to the level necessary to constitute participation to the extent necessary to be relieved on §33(g)'s forfeiture provision according to *Sellman*. See also *Pinnell*, 22 B.R.B.S. 61 (1989); *Pool*, 30 B.R.B.S. 183 (1996).

Pinnell, *supra* does not relieve Claimant of its burden to obtain written consent. As in *Sellman*, in *Pinnell*, the Employer's participation was much greater than that of either Mr. Fazio or Mr. Simon. For example, in *Pinnell*, the employer intervened in the third-party action, agreed to waive part of its lien, paid compensation and medical benefits to the claimant until the day the settlement was entered into, and corresponded with the carrier's attorney confirming that employer would waive part of its lien. *Pinnell*, 22 B.R.B.S. at 65. Although Employer paid compensation and medical benefits to Claimant until the settlement was entered into, none of the other actions performed by the employer in *Pinnell* are present in the instant case. In addition, the facts of the instant case are analogous to *Pool*, *supra*, where the Board found that although the employer had intervened in the third-party case and participated to some degree in the settlement, it was not precluded from the application of §33(g) because it did not appear on the claimant's behalf, never signed the settlement agreement, and even refused to do so. *Pool*, 30 B.R.B.S. at 188.

Claimant also argues that although Mr. Katz admitted he was not familiar with the Act or §33(g) when he represented Claimant in his third-party case, he should not be bound by §33(g)'s forfeiture provisions because Mr. Fazio and Mr. Simon neglected to advise Mr. Katz of §33(g)'s written consent requirement. In addition, although Mr. Simon did fax Mr. Katz a letter on August 23, 1999 advising him that Claimant would need to obtain Sea-Land's consent before he entered into a settlement or else he would forfeit his compensation from Sea-Land, Claimant argues that this letter was sent too late to adequately notify Mr. Katz.

First, Mr. Fazio represents Employer in land-based claims and not claims involving the Act. His participation in the instant case was only to represent the Sea-Land employees that Mr. Katz deposed. Therefore, as he admitted during his testimony, he was not familiar with the Act because he does not handle cases where the Act is involved. Mr. Simon represents Employer as compensation counsel so it is he who deals with Employer's cases where the Act is involved. Nevertheless, the undersigned is unaware of any law or duty that would require Mr. Simon or Mr. Fazio to instruct Mr. Katz on the requirements of §33(g). In addition, there is no evidence in the record that either Mr. Fazio or Mr. Simon knew that Mr. Katz was unaware of the requirements of §33(g) or that they purposely did not inform Mr. Katz of §33(g) prior to the trial. While it is unfortunate timing that Mr. Katz left his office either as Mr. Simon's fax was being sent or before it was received and his employee who handles faxes was out that day, Mr. Simon did in fact notify Mr. Katz of his position prior to the date the settlement was entered. Therefore, I find no merit to Claimant's argument that either Mr. Fazio or Mr. Simon should have notified Mr. Katz of §33(g)'s forfeiture provision.

2. If Employer did not consent to a third-party settlement pursuant to §33 of the Act, whether Claimant remains entitled to medical benefits?

Claimant's second argument is that even if he is barred from receiving compensation under §33(g), that bar to compensation does not include medical benefits. Claimant argues that §33(g)(1) refers only to compensation and that the Supreme Court has previously found that "compensation" does not include "medical benefits." See, *Marshall v. Pletz*, 317 U.S. 383 (1943). Based on the definition of compensation as it appears in §2(12) and the relevant case law, I agree that "compensation" standing alone as it appears in §33(g)(1) does not include medical benefits. See, *Marshall, supra*; *Pinnell v. Patterson Service*, 22 B.R.B.S 61 (1989); *Bethlehem Steel Corporation v. Mobley*, 920 F.2d 558 (9th Cir. 1990). However, this interpretation of the term "compensation" does not necessarily entitle Claimant to medical benefits.

There have been several cases dealing with whether non-compliance with §33(g)(1) results in a forfeiture of medical benefits. See *Pinnell, supra*; *Mobley, supra*. In addition, Claimant cites *Pinnell* and *Mobley* in his argument that "compensation" as it is used in §33(g)(1) does not refer to medical benefits. However, neither of these cases relieve Claimant of his burden under §33(g)(2) so as to allow him to retain his right to medical benefits. In *Mobley*, the Ninth Circuit Court of Appeals found that §33(g)(1) was not applicable because the ALJ found that the employer was not liable for any disability benefits and therefore the amount of the claimant's settlement was greater than the amount of compensation that the claimant was entitled to. *Mobley*, 920 F.2d at 560. Therefore, because the amount of settlement was greater than the amount of compensation the employer was liable for and the notice of medical benefit liability employer received was timely, the claimant's medical benefits were not barred by §33(g)(2).

Pinnell, supra also fails to relieve Claimant of his burden under §33(g) so as to allow him to retain medical benefits because as I previously found, Claimant did not provide Employer with adequate notice to relieve him of his burden. Moreover, *Brown & Root, supra*, does not allow Claimant to retain his medical benefits. In *Brown & Root*, the Fourth Circuit Court of Appeals held that the total amount of Claimant's disability and medical benefits should not be included in §33(g) calculations because compensation and medical benefits are distinct concepts under the Act.

In order to determine whether Claimant remains entitled to medical benefits, it is also necessary to consider the impact that §33(g)(2) has on Claimant's case. Claimant asserts that even if the undersigned determines he is not entitled to compensation because he did not obtain employer's written consent, he is not barred by §33(g)(2) because Employer had notice of the settlement. The Supreme Court in *Cowart, supra*, stated that §33(g) of the Act provides "that under certain circumstances if a third-party claim is settled without the written approval of the worker's employer, all future benefits, including medical benefits are forfeited." *Cowart*,

505 U.S. at 471. The plain language of §33(g)(2) provides two situations where an employee's right to compensation and medical benefits may be terminated: (1) If no written approval of the settlement is obtained and filed as required by §33(g)(1); or (2) If an employee fails to notify an employer of a settlement of judgment rendered against a third-party in a situation where only notification, and not written approval, is required. See, *Cowart, supra*.

I have found that Claimant forfeited his right to compensation under §33(g)(1) because he did not provide Employer notice to the extent that would relieve Claimant of the burden of §33(g) and did not obtain Employer's written consent. In addition, neither of the two circumstances which permit a claimant to notify an employer of a settlement or judgment instead of obtaining its written consent are present in this case. Therefore, given the plain language of §33(g)(2), Claimant has necessarily forfeited his rights to compensation and medical benefits pursuant to §33(g)(2) because he did not comply with the requirements of §33(g)(1).

3. If Employer did not consent to a third-party settlement pursuant to §33 of the Act, whether Employer terminated compensation payments prematurely?

Claimant's final argument is that even if §33(g) is applicable to his case, Employer prematurely terminated payment to him. Claimant alleges that Employer's termination of payment on September 6, 1999 was premature because A.G. Ship did not pay Claimant the settlement money until October 4, 1999. Therefore, Claimant argues that he is owed compensation from September 7, 1999 through October 4, 1999.

Claimant argues that in order to have a valid, enforceable settlement in a third-party action, payment by the defendant must be made. Claimant goes on to state that if payment is not made, there is no consideration and the settlement can be rescinded so as to prevent the applicability of §33(g). Claimant cites two cases as support for his proposition: *Rosario v. M.I. Stevedores*, 17 B.R.B.S. 150 (1985) and *Formoso v. Tracor Marine, Inc.*, 29 B.R.B.S. 105 (1995). However, I do not find either of those cases to be applicable precedent in the instant matter because in both of these cases, the Board found that no settlement agreement was ever entered into. See *Rosario, supra*; *Formoso, supra*. In addition, in *Shoemaker v. Schiavone & Sons, Inc.*, 20 B.R.B.S. 214 (1988), the Board held that a claimant's right to compensation terminates upon the execution of a third-party settlement. *Id.* at 218. Therefore, because a settlement was entered into on August 24, 1999, I find that Employer was entitled to terminate compensation at any time subsequent to the date of the settlement and thus is not liable for benefits up until October 4, 1999, the date that A.G. Ship made payment.

It is recognized that §33(g) imposes a seemingly harsh result on the Claimant who put his trust in his attorney to obtain all of the compensation that he is entitled to and who, through no fault of his own, has forfeited his right to compensation and benefits from his employer. However, as the Supreme Court explained in *Cowart, supra*:

We do recognize the start and troubling possibility that significant numbers of injured workers or their families may be stripped of their LHWCA benefits by this statute, and that its forfeiture penalty creates a trap for the unwary. It also provides a powerful tool to employers who resist liability under the Act. . . . If the effects of the law are to be alleviated, that is within the province of the Legislature. It is Congress that has the authority to change the statute, not the courts.

Cowart, 505 U.S. at 483-484.

ORDER

Based upon the foregoing findings of fact, conclusions or law, and the entire record, I issue the following order:

IT IS ORDERED THAT Claimant has forfeited his rights to compensation and medical benefits for failing to obtain Employer's written consent to Claimant's third-party settlement agreement as required by §33(g) of the Act.

A

PAUL H. TEITLER
Administrative Law Judge

Camden, NJ